

United States v. Contreras-Contreras, No. 03-10154

DEC 16 2003

TASHIMA, Circuit Judge, with whom Judge Thomas joins,
concurring:

CATHY A. CATTERSON
U.S. COURT OF APPEALS

I concur in the memorandum disposition. As we note in the disposition, Contreras also argues that the district court erred in allowing an INS agent, who was not authorized by agency regulations, 8 C.F.R. § 103.7(d), to certify to the non-existence of official INS records, to testify that, indeed, there was no official INS record that Contreras had received permission to reenter the United States. We avoid this issue on harmless error grounds because Contreras admitted that he entered the country illegally and without permission. Nonetheless, the government's attempt to end run the procedures established by its own agency regulations is troubling.

In addition to testifying about the contents of Contreras' A file, the INS agent also testified on what an A file should contain and gave the opinion that Contreras' A file was "consistent with . . . what should be contained in the A-file." He also testified that the file was "kept in accordance with regulations." The sum of this testimony was that there was the absence of any INS record that Contreras has received permission to reenter the United States. That is precisely the certification that certain designated personnel within the INS are authorized to make under the regulations. Under 8 C.F.R. § 103.7(d)(4), designated INS

officials “have the authority to make certification . . . [of] the non-existence of an official Service records.” *See United States v. Mateo-Mendez*, 215 F.3d 1039, 1043 (9th Cir. 2000). The INS agent here concededly is not among those officials designated by the regulation. Further, he was not otherwise qualified to testify as to what documents an A file should contain or the regularity with which Contreras’ A file was kept.

The government flirts with reversal when it attempts to short cut regularly-established procedures by relying on the testimony of unqualified witnesses whose testimony lacks the minimum necessary foundation. With this added observation, I concur in the majority’s disposition.